BEFORE THE STATUTE OF FRAUDS, MUST AN AGREEMENT TO STAND SEISED HAVE BEEN IN WRITING?

THAT the declaration of a use before the Statute of Frauds need not have been in writing if there was a common-law conveyance, as by feoffment, fine, or recovery, appears to be clear (see Shepp. Touchstone (by Preston), 519); and in 27 Hen. VIII. 8 *b*, the same year in which the Statute of Uses was enacted, there is a discourse upon uses, in which it is said that the land cannot pass without livery, but the use may by bare words.[1] It is asserted by Mr. Washburn (see 2 Wash. R. P. 127–129, 99, 100) and by Mr. Tiedeman (Tiedeman R. P. 2d ed. § 783) that an oral agreement to stand seised was good before the Statute of Frauds; but neither of these authors cites adequate authority for the proposition. It is, of course, to be understood that a technical covenant must have been under seal; and we think that the following discussion will show that the answer which we shall give to the question at the head of this article will depend upon what force and meaning we shall attach to the well-known case of Callard *v.* Callard. The transaction in Callard *v.* Callard, Cro. Eliz. 344 (Queen's Bench), was as follows: A father being seised in fee of certain land, in consideration of a marriage of Eustace, his eldest son, said these words, being upon the land: "Eustace, stand forth. I do here, reserving an estate for my own and my wife's life, give thee these my lands, and Barton to thee and thy heirs." It was held that this was a good conveyance; but upon what grounds does not appear. This decision was reversed in the Exchequer Chamber, reported in Moore, 687. But it appears in the report of Moore that in the Queen's Bench (*supra*) Popham, C. J., held that the consideration of blood raised a use to Eustace without writing; but that the three other judges were of a contrary opinion, and that these latter regarded the transaction as a feoffment with livery being upon the land; and that there was a use to the feoffor and his wife for life, and afterwards to Eustace and his heirs. In the Exchequer Chamber, out of seven judges, five regarded the

[1] See further, 1 Sanders on Uses (5th ed.), 14, 218; 1 Perry on Trusts, § 75, 2d Inst. 675, 676.

transaction as not a good conveyance. The grounds stated in this report (Moore) are that there was no feoffment executed, because the intent was repugnant to law, — that is, to pass an estate to Eustace, reserving a particular estate to himself and his wife; and that a use it could not be, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect; and this report states that they all agreed that if this were a use, yet it would not arise upon natural affection without a deed.

In the report of this case in Popham, 47 (there spelt Collard *v.* Collard), it was said by Gawdy, J., of the Queen's Bench (see pp. 47, 48), that "by a bare word an use cannot be raised, as appeareth in diverse reports," citing Mich. 12 and 13 Eliz., which we take to be the case of Page *v.* Moulton, cited *infra*. But then Gawdy, J., added (p. 48): "But to say generally that an use cannot be raised or charged upon a perfect contract by words upon good consideration cannot be law." And Gawdy, J., goes on to say (p. 48) that it is to be considered what was the law before the Statute of Uses; and that a use was raised before that statute by a grant of land for money, which is a bargain and sale, and that a grant of land made in consideration of the marriage of the grantor's child is as valuable as a grant of it for money, and more valuable, and that at the common law there was no difference between these; and that the use by the contract was transferred according to the bargain in each case; that because of the Statute of Enrolments, which requires a bargain and sale to be by deed indented and enrolled, it appears that before that statute the use would have been passed by bare words; that that statute applies to bargain and sale only; hence, that other cases are as they were before the Statute of Enrolments, and that the Statute of Uses has made no change in this particular. But Gawdy, J., repeats that every slight or accidental speech shall not be enough to raise a use; but that if upon a statement by a man of what he will give upon the marriage of his child, the marriage shall occur, and that in consideration thereof the young people shall have such land, and for such an estate, then a use shall be raised, and shall pass accordingly to the parties; and Fennor, J., agreed to this. Popham, C. J. (p. 49), also said, that by Baynton's Case, 6 and 7 Eliz., it is admitted that a use was raised at common law by bargain and sale by parol; for otherwise to what purpose was the Statute of Enrolments? And that by the same case it is also admitted now to pass

by parol upon a full agreement by words in consideration of marriage or blood, etc.; that in that case it was also agreed that the consideration of nature is the most forceable consideration which can be, and that a bare covenant by writing without consideration will not change a use; therefore that the force is in the consideration. (See *infra*, Baynton's Case.) Fennor, J., said (same report, Popham, 47) that the words being spoken on the land amounted to a livery. Gawdy, J., said (p. 47) that the words amounted to a livery if they are sufficient to pass the estate; but that the words were not sufficient for that purpose, because his intent appeared that Eustace was not to have the land until after the deaths of the grantor and of his wife, and therefore were of the same effect as if he had granted the land to Eustace after his death; and that it cannot pass as a use, because by bare words a use cannot be raised, etc., as is above set forth in the extract from the opinion of Gawdy, J. Popham, C. J. (same report, p. 49), would seem to regard the words spoken as not to amount to a livery; and he said that "where land is to pass in possession by estate executed, two things are requisite,—the one the grant of the said land, the other the livery to be made thereupon;" for that the bare grant without livery is not enough. Clench, J., said (p. 49) that the transaction amounted to a grant and livery also; and that there was a use in the grantor and wife for their lives.

The report of this case in Popham, in the Queen's Bench, does not therefore agree with the report of what was considered in the Queen's Bench as appearing in Moore, 687 (*supra*), and which is above set forth; for the report in Popham does not make it appear that the three other judges than Popham, C. J., regarded the transaction as a feoffment to the use of the feoffor, etc., for life, and afterwards to Eustace and his heirs.

Gawdy, J., also on page 48 of this report (Popham) said that by an exception out of the Statute of Enrolments, London is as it was before that statute; and therefore that lands may pass there by bargain and sale by word without deed. Popham, C. J., also (on p. 49) made the same remark; and, says the report, to this all the justices agreed. Popham, C. J., cited to this Chibborne's Case, Easter, 6 Eliz., Dyer, 229 *a*, where it was held that such land may pass by bargain and sale by words only.[1]

Lord Bacon shows that the mere letter of the Statute of Uses does not prove that an agreement to stand seised may be raised by

[1] See also 2d Inst. 675, 676.

parol.[1] But the arguments of Gawdy, J., and of Popham, C. J., in Callard *v.* Callard (*supra*), do not rest at all upon any phrases of the Statute of Uses, but upon the facts in their arguments mentioned.

In Corben's Case, Moore, 544, the father, in consideration of marriage, agreed by parol to stand seised of the land to the use of himself for his life, and afterwards to the use of his son and his heirs. The question was whether this was good. In the Queen's Bench there was a contrariety of opinion among the judges, and it was adjourned to the Exchequer Chamber; and this report says that there it is still pending. This case appears in the Queen's Bench after Callard *v.* Callard in the Queen's Bench. It does not appear at what time Corben's Case was adjourned to the Exchequer Chamber; but the decision in the Exchequer Chamber in Callard *v.* Callard was later than the appearance of Corben's Case in the Queen's Bench. For aught that appears, it may have been brought to the Exchequer Chamber after the decision of the Exchequer Chamber in Callard *v.* Callard.

Callard *v.* Callard, as abbreviated in 2 Rolle Abr. 788 (see *infra*, where this is referred to), is followed by a statement referring to Corben's Case (Corbyn and Corbyn).[2]

It appears in Rolle, 2 Abr. 784, pl. 4, giving Corben's Case (Corbyn et Corbyn), that it was held at Michaelmas 37 and 38 Eliz. in the Queen's Bench, that if a man, in consideration of a marriage to be had between B., his son, and A., covenant to stand seised to the use of B. and A., this is a good consideration to raise a use to A. The report of this case in Moore (*supra*) gives the date as Hilary, 36 Eliz. But this statement of Rolle differs as to two beneficiaries instead of one, as is seen by comparison with the above report in Moore; and it does not make any reference to a parol agreement, nor to any future use after the death of the grantor. The question, however, of a future use does not enter into the question here sought to be solved; nor, if the points be identical, is the matter of the number of beneficiaries pertinent to our inquiry.

In Dyer, in a note to Page *v.* Moulton (discussed *infra*), p. 296 *b*, note, it is said as to Corbin *v.* Corbin, citing 2 Rolle Abr. 784, pl. 4 (*supra*), and Moore, 544 (*supra*), that the point that a use may be

[1] Bacon's Reading upon the Statute of Uses. London ed., 1806, pp. 45, 46, and note 78 on p. 137.

[2] The copy in the Social Law Library in Boston is torn, so that it does not appear what that statement is; but it would appear to be that the word torn is the word contra, and the reference is to Corbyn and Corbyn, 37, 38 Eliz. Queen's Bench.

created without deed, upon consideration of natural affection, was not determined; but that it was held by three justices that this is good. This note in Dyer is doubtless error; and the reference is to the three justices in Callard *v.* Callard, as is seen in the report of that case in Popham, 47, above set forth.

As the matter stands as thus far discussed, there does not appear to have been any actual adjudication of the point whether before the Statute of Frauds an oral agreement to stand seised might not have been good. In Callard *v.* Callard, as reported in Moore (*supra*), five of the judges, a majority, in the Exchequer Chamber said that there was no feoffment for the reasons above quoted; and that it could not be a use, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect. This latter means, as we understand it, that there could not be a use because the purpose was not to raise a use without a feoffment with livery of seisin, but by a feoffment which did not take effect in possession. Popham, C. J., in the report of this case in Popham, on p. 49, uses the same phrase "estate executed;" and he says: "Where land is to pass in possession by estate executed, two things are requisite: the one the grant of the said land; the other, the livery to be made thereupon;" for that the bare grant without livery is not enough. Then the report in Moore adds to the foregoing: "And they all agreed that if this were a use, yet it would not arise upon natural affection without a deed." This last expression is a *dictum* merely; because the majority of the court has declared that the purpose was not to raise a future use by mere agreement. The decision in the Exchequer Chamber turns upon *the purpose of the parties* and *the nature of the transaction*, and does not lead to a conclusion that an oral agreement to stand seised of a future use might not, under other circumstances, have been good, or of a use presently to take effect. But even if that expression be regarded as an essential part of the decision, it may well enough follow from the view as to such *hypothetical* purpose of the parties, and the *nature of the transaction*, namely, that where the purpose is to raise a future use by a transaction directly with the *cestui que use*, there must be a *deed*. Here, in any view, the transaction was directly with Eustace. In the theory of the court it was not the purpose to raise a future use in Eustace by mere agreement; but in the opinion of a majority of the court, it was the purpose to raise a present estate in him, with a reservation

of an estate for the lives of the grantor and of his wife. It therefore would seem that the case does not lead to the conclusion that an oral agreement to stand seised of a future use might not, under other circumstances, have been good, or of a use presently to take effect.

In Pitfield *v.* Pearce, Trinity, 15th Charles II., reported in March, 50, there was a deed. It was held that no estate passed, because it did not appear that it was the intention to raise a use; for that by the word "give" it was intended that the transaction should be by transmutation of possession. Twisden says (p. 50) that "in Callard and Callard's Case," "the better opinion was that in that case it did amount to a livery, being upon the land," and that there the word "give" was used. But Twisden did not agree that no estate passed in Pitfield *v.* Pearce. He laid stress upon the transaction being upon the land in Callard *v.* Callard; whereas in Pitfield *v.* Pearce it was not upon the land.

The case of Callard *v.* Callard in the Exchequer Chamber is also reported in 2 Anderson, 64, under the name of Tallarde *v.* Tallarde. This report, referring to the case in the Queen's Bench, says that some said that it was a feoffment to the use of the feoffor and his wife during their lives, and afterward to the use of Eustace and his heirs; and some held that it was in the husband and wife by use raised in the husband and wife and afterward to the use of Eustace and his heirs; and this in the Queen's Bench by the judges there. So, whichever way, Eustace had the fee after the death of the husband and wife; and upon this they gave judgment accordingly; upon which a writ of error was brought to the Exchequer Chamber, and the judgment was reversed, — Michaelmas, 38, 39 Eliz. And first they held that no use could be created by these words, nor words only. The words themselves do not so import, for there is not a word of use besides by the father; and his intent does not appear at all to create a use; and by his express words or intent shown, a use could not be created. This report then proceeds to state the case of Page *v.* Moulton, which is given *infra;* and then the report adds: Which case in effect as to a use is the case in question; but if by deed upon good consideration a covenant that another shall have the manor of D. to him and his heirs, this makes a use now as was held M. 1 M., Dyer, fo. 96. The case here referred to is that of Bainton Petitioner *v.* The Queen, Mich. 1. Mary, which is given *infra.* This report, then, proceeds to set forth that they said it could not be a feoffment, because there

were no words, and there was no intent to prove this feoffment nor livery, as this case is; for it appears by the words that he intended to have the estate to himself and his wife during their two lives, which could not be if he enfeoffed the son, etc.

To avoid repetition, we will not discuss this report in Anderson until later.

Spence says (1 Spence's Eq. Jur. 449) (even using the word "covenant"): "A man, it seems, might covenant to stand seised to an use without deed;" and in the note he says, "I have assumed that it was first settled that a deed was necessary by Collard *v.* Collard, 2 Rolle Abr. 788," referring to his page 478; and he adds that "Lord Chief Baron Gilbert seems to have considered that a deed was always necessary to raise an use where the possession was not passed." For this reference to Gilbert, see *infra.* In note C. to page 478, Spence says: "At first, parol declarations seem to have been admitted as constituting a covenant to stand seised; but in the reign of Mary it was decided that there must be a deed as indicative of a settled resolution, Collard *v.* Collard, 2 Rolle Abr. 788." Callard *v.* Callard was decided in the reign of Elizabeth, as above. The statement of it in 2 Rolle Abr. 788, cited by Spence (*supra*), is imperfect, as appears from the report of it. In 2 Rolle Abr. 788, a very brief statement is made, and that only as touching a use raised upon natural affection by parol in the nature of a covenant. Spence, relying upon this brief statement, remarks as above; but as above appears, if the report in Moore be taken, this was a point which the court did not have occasion to decide. If the report in Anderson be taken, the statement therein must be read in connection with the context. It appears in that report that the words used in the transaction were not sufficient to raise a use. To this is added the statement, *which is superfluous,* "*nor words only;*" and then, that there was no intent to create a use; and that by his *express words* a use could not be created. The court, then, according to this report, likened the case to Page *v.* Moulton (stated *infra*); and see that case as understood by Gawdy, J. (referred to above). It does not, from either of these two reports, that of Moore and that of Anderson, appear that the Exchequer Chamber found as they did upon the general ground that a parol agreement to raise a use by standing seised upon good consideration would fail, or that any general rule of law was established in a case of such peculiar facts, consisting, among other

elements, of a transaction *upon the land*, had with the ulterior beneficiary himself, with an estate in possession to remain in the grantor. Finally, if there were no other reason, such diversities appear in the two reports of the case, that of Moore and that of Anderson, that there is no authentic evidence regarding the exact reasons.

The remark of Spence (*supra*), with reference to the reign of Mary, is based upon the following statement in 2 Rolle Abr. 788 (above referred to), and cited by Spence. Rolle says, in his brief statement of Callard *v.* Callard, above referred to, that it is there said (that is, in Callard *v.* Callard) that a case in 1 Mary was in accord. That case in 1 Mary is no doubt the case of Bainton Petitioner *v.* The Queen, Michaelmas, 1 Mary, and reported in Dyer, 96. This case is sometimes cited as Seimors Case. This case is as follows: A., who was attainted, covenanted and granted by *indenture* to B. (in consideration of land already conveyed by B. to A. after the death of B.) to levy a fine of land, to be assured to him, A., for life, remainder to B. in tail. No fine was levied. Held, that no immediate use was raised, for then by no possibility could the covenant ever be performed, and that it is in the future tense; but the report proceeds to say that the court "agreed in a manner, that if I covenant, in consideration of marriage, or for a sum of money paid me, that the party shall have the said manor of D. by express words, this shall change an use immediately, for there is no estate to be made. It was also agreed that if *cestui que use* wills that his feoffees should make estate to J. S. in tail or fee, and die, the use changes before the estate be executed." See further this case cited and stated in Winch, 36. See further this case referred to in 3 Leonard, 75.

Page *v.* Moulton, decided in Michaelmas term, 12th and 13th Eliz., Dyer, 296 *b*, above referred to, was earlier than the decision of Callard *v.* Callard in the Queen's Bench (*supra*). In Page *v.* Moulton, a father upon communication of marriage of his youngest son, promised the friends of the wife that after his death and the death of his own wife, the son should have the land to him and his heirs. The promise was by parol. The marriage took place; "and no consideration on the part of the woman." The report states: "By the opinion of all the four justices of the bench, without open argument, the use is not altered by such naked promise; and so adjudged in next Hilary term." The statement that it was "without open argument," may indicate that the case was only lightly considered.

The above expression, that of the alteration of the use, is a

common expression in the old books; and other instances of it, or of the equivalent expression, that of the use changing, — meaning changing from the old owner of the legal estate to the new owner of the legal estate, — are to be found in this paper. It is to be explained in this way. Lord Bacon (see Lord Bacon's Reading upon the Statute of Uses, London ed., 1806, pp. 44, 45), speaking of the period of the Statute of Uses, says: "Now, at this time, uses were grown to such a familiarity, as men could not think of possession but in course of use; and so every man was seised to his own use as well as to the use of others." We have just above, in Bainton Petitioner *v.* The Queen, a double use of the expression; in one of which it means a change of the legal estate, and in the other a change of the equitable estate; but very commonly it means a change of the legal estate. The above case of Page *v.* Moulton is cited in Englefield's Case, Trinity, 32 Eliz., Moore on p. 333, to the point that a use could not arise in the latter case because it was not alleged that the writing was sealed. The case of Page *v.* Moulton has been referred to more than once above; and it is the case which Gawdy, J., in Callard *v.* Callard, cites to show (as above) that a use cannot be raised by a bare word. Crompton (Crompton's Jurisdiction of the Courts, on p. 61) also states Page *v.* Moulton; and gives as reasons that it is a nude pact, because no consideration moves on the part of the woman, the agreement being by parol; but Crompton (*ib.*) adds: But I collect that if any consideration had come on the part of the woman, the use would have been changed by this agreement, because there would have been a *quid pro quo, although it was by parol;* and that Manwood, Chief Baron, said it was adjudged, that if a man said to his son and a woman whom he was to marry, that, in consideration of the same marriage, they should have the same land to them in tail, this is good tail without deed or other circumstance. The son marries, as appears afterward. In a note to the report of Page *v.* Moulton in Dyer (as above), Callard *v.* Callard is cited, giving as the reports thereof, Moore, 688, and 2 Anderson, 64, and Popham, 47; and in this note it is said that in the Exchequer Chamber in the case of Callard *v.* Callard "by Clerk, Walmsley, Periam, and Anderson, upon a consideration of natural affection an use may be created without deed, and no justices *contra.*" This is the same note as that referred to above, in which there is manifest error.

Gilbert (see Gilbert on Uses, 270, 271) says that where the pos-

session was passed, a use could be raised by word; and he further says: "So it seems a man could not covenant to stand seised to a use without a deed, there being no solemn act; but yet a bargain and sale by parol has raised a use without, and it has been held to do so since the statute in cities exempted out of the statute." And see above Chibborne's Case. Gilbert also says (pp. 270, 271) that "where a deed was requisite to the passing of the estate itself, it seems it was requisite for the declaration of the uses, as upon a grant of a rent, or the like."

Duke on Charitable Uses, p. 136 (London ed. of 1805), says, speaking of charitable uses under the statute of Elizabeth: "Where the things given may pass without deed, a charitable use may be averred by witnesses; but where the things cannot pass without a deed, there charitable uses cannot be averred without a deed proving the use." See further 1 Perry on Trusts, § 75.

There are more or less *dicta* to be found in the reports, relying upon Callard *v.* Callard. In Buckley *v.* Simonds, Winch. 35, Mich. 18 Jac. I., Hendon, Sergeant, arguing, said (on p. 37), speaking of Page *v.* Moulton (*supra*), that it was there held that no use was raised, and that the reason was that the "covenant was by words, and not in writing; but it was not doubted, if this covenant had been by writing, but that the covenant will raise an use;" and he adds (p. 37), "and so was Callard *v.* Callard's case, 37 Eliz.;" and that it was ruled that a use did not arise to the son, "because this was by words only;" but that "it was also agreed that if these words had been by writing they had been sufficient to raise an use to the son." Hendon, Sergeant, also referred to a case in Dyer as Dyer, 232. He probably refers to Constable's Case, Dyer, 101 *b.* But the question there raised was not adjudicated. It does not appear to have been a parol agreement. And in this same case of Buckley *v.* Simonds, later reported in the same report, Winch. 59, Hutton, Justice, arguing, said (p. 60) that it was "resolved in 38 Eliz. in Collard and Collard's Case" that a deed is necessary. This is *dictum*, as in Buckley *v.* Simonds the agreement was by indenture. The case is cited in 1 Siderfin, 26. Hore *v.* Dix, 1 Siderfin on p. 26, Hilary, 12 Charles II. is another case. There was an indenture in this case. The *dictum* is, that it was resolved that a use at this day could not be raised without deed, and to prove this *vide* Callard and Callard's Case, 1 Rep. 75 *a*, 12 Eliz. Dyer, 296 *b.* This last reference is to the note in Dyer. In Foster *v.* Foster, 1

Siderfin, 82, 14 Charles II. King's Bench, there was *a deed* by a mother to her eldest son. It was held that it could not take effect as a bargain and sale because not enrolled; and that it could not operate at common law because there was no ceremony; and that it could not operate by way of use because upon the face of the deed it appeared that such was not the intent of the parties.

Pitfield *v.* Pierce's case, Hill. 11 Car. II. in this court was cited, which was, says the report of Siderfin above, in effect: I give and grant to my son and to the heirs of his body, to have and to hold after my death, and adjudged that no use arose. See Pitfield *v.* Pearce, Trinity 15th Car. II. *supra.* And the report of Siderfin proceeds as follows: And it was affirmed by Twisden, Justice, and not denied by any one, that although *a deed* operate by way of use or otherwise, yet no particular estate can be reserved to the person who parts with the estate. And for this cause also it was held that the deed to the eldest son was void, — that is to say, because in this deed there was a clause; she, the said Margaret Foster, enjoying it during her life. And *if the case of* Callard, 1 Rep. 75, had been by deed, yet they held that no use would have arisen, because it is reserving an estate to me and my wife, which could not be; and therefore the whole operation of the deed is for this reason hindered and obstructed. 38 Hen. VI. 38. Also the court was of the opinion, according to the case of Callard, that no use would arise without deed, as they of the Common Bench held before, p. 26. *For this* see *supra* Hore *v.* Dix, 1 Siderfin, 26.

The report adds, *vide* 12 Eliz. Dyer, 296 *b* (which is Page *v.* Moulton, *supra*).

This case of Foster *v.* Foster is also reported in Sir Thos. Raymond's Rep. 43, King's Bench. This report contains arguments of counsel, and the mere finding of the court for the plaintiff.

In the foregoing cases there was *a deed;* and the statements are merely *dicta.*

The language of Holt, C. J., in Jones *v.* Morley, 1 Lord Raymond, 290, is also but *dictum.* The expression is: "Consideration of blood will not raise a use without deed," citing Callard *v.* Callard, Moore, 687.

See same case, Holt's Rep. 321.

In Roe *v.* Tranmer, 2 Wilson, 78, Willes, C. J., said (p. 78) that everything was present to make a good covenant to stand seised; and mentioned, among other elements, that there was a deed. This was in Trinity term, 30 and 31 Geo. II.

3 Com. Dig. 286 declares that a covenant to stand seised "ought to be by deed; for an use shall not be raised by parol." As *contra*, Comyn here cites Plowd. 303 *a*, which is a part of an argument for the defendants. The case is that of Sharington *v.* Strotton, for which see *infra*. Comyn also cites Callard *v.* Callard in the Q. B. He further cites Callard *v.* Callard in Moore, and in Popham; Page *v.* Moulton in Dyer; Callard *v.* Callard in Rolle Abr.; Hore *v.* Dix in Siderfin; and Foster *v.* Foster in Siderfin; for all of which see *supra*. He also cites 1 Ventris, 140. This case is Crossing *v.* Scudamore, 1 Ventris, 137. Counsel arguing (p. 140) says that a deed is necessary to raise a use by way of covenant, citing Callard *v.* Callard in 3 Cro. (Eliz. 344), and in Popham's Rep.; and he adds "and hath been often resolved since."

Sharington *v.* Strotton, Plowd. 298, also cited as Baynton's Case, also as Bainton's Case, was a case in the Queen's Bench, 7 and 8 Eliz. The transaction was upheld as a good *deed*, being a covenant to stand seised.

Crompton's jurisdiction of the courts is as follows, on page 60: A man by parol, without writing, and without livery of seisin, grants to A. B. land, *pro consilio suo impedendo*, the grantee shall have *sub-pœna*, for there is a good consideration to change the use before the statute; and so it is to change the possession to this day; for the said statute speaks of bargain and sale only. *Vide* Com. fol. 301. This reference is to Sharington *v.* Strotton (*supra*), Plowden, 301, argument of counsel. Crompton then proceeds (*ib.*): If I promise and agree with another that if he will marry my daughter, that afterwards they shall have my land, and he does this, they have a use in my land, and I shall be seised to their use, for the thing is done by which I am benefited, etc. (citing Fleetewood and Wray, counsel in Bainton's Case) (see *supra*); and the Statute of Uses made in 27 Hen. VIII. ch. 10 says where any one is or shall be seised to the use of another by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any means whatever, the *cestui que use* shall have the land as he had the use, etc. So by the intent of the makers of the statute, a man would be seised by bargain and sale, covenant or agreement, and this is to be understood by money or other good consideration, citing Com. 304. The above reference is to arguments of counsel in Sharington *v.* Strotton (*supra*), one of whom was Plowden himself, then an apprentice of the Middle Temple.

In respect to *the mere words* of the Statute of Uses, as *not* effectual to prove that an agreement to stand seised may be raised by parol, see the argument of Lord Bacon, referred to *supra.*

Crompton then proceeds, on p. 61 : And it seems that any consideration which is good and reasonable, and where there is a *quid pro quo,* is sufficient to change the use to this day ; and the statute transfers the possession to the use. He here excepts bargain and sale as excepted by the Statute (of Enrolments), citing as above arguments of counsel in the above case in Plowden. Crompton further says (p. 61) : A man by parol, without deed, GRANTS to his son and his wife in tail such land in consideration of said marriage ; and it was agreed by all the justices that the use changed upon said consideration without writing, and after marriage, as at the assizes at Stafford, in the case of Babington, Manwood, Chief Baron of the Exchequer, said. See another reference to another statement of Crompton, *supra.*

Sheppard's Touchstone, 508, by Preston, is as follows, — the following parts in brackets [ ] are the words of Preston : That there is no need that a covenant to stand seised should be "by deed indented, etc., or that the deed be enrolled ; for uses [except on a bargain and sale, under the Statute of Enrolment] may be raised by deed poll as well as by deed indented. Also uses may be created, as some hold [and truly], by word or parol agreement, as well as by deed or writing ; for it is said it hath been adjudged [but the proposition is not law] that if a man SAY TO HIS SON and a woman that his son is to marry, that, in consideration of the same marriage, they shall have the land to them two in tail, that hereby a good estate tail will arise after the marriage ; and that where one doth by word without deed GRANT TO HIS SON and to his wife in tail land in consideration of their marriage, that it was agreed by all the judges that the use did arise upon this agreement. Howsoever, it is most safe in these cases to do it by deed and in writing ; for Dyer, 296, Plowd. 22, seem to oppugn this."

In a foot-note it is said : "See Stat. 29 Charles II., ch. 3, which makes a writing necessary." Of course the Statute of Frauds, here alluded to, only goes to the question of a writing, and does not touch the question here considered as to the necessity of a deed ; for if any writing was necessary before the Statute of Frauds, in an agreement to stand seised, it was a deed. The marginal note reads as follows : Crompton's Jurisdiction, 61, 60 (for which see *supra*) ; Plowden, 301, 308 (which is Sharington *v.* Strotton, *supra*) ; "and the better opinion

of the judges in Corben's Case, 38 Eliz." (for which see *supra*); Dyer, 296 (this is Page *v.* Moulton, above); Plowd. 22, is Colthirst *v.* Bejusin. There is nothing pertinent on p. 22; but counsel, in arguing that case, says, on p. 25, that it is requisite that conveyances of things should be certain; for which reason the law has ordained certain ceremonies to be used, and especially in the case of freeholds.

The above statement of Mr. Preston that "the proposition is not law," would seem to apply to the first proposition, namely, "that if a man SAY to his son," etc. It would seem that Mr. Preston expresses no opinion concerning the other and later proposition, namely, that if one makes A GRANT BY WORDS, etc. As to these two distinct propositions, see the extracts from Crompton given above.

As to the above reports of Callard *v.* Callard, as found in Croke's Eliz. (*supra*), Moore (*supra*), Popham (*supra*), Anderson (*supra*), and Rolle's Abr. (*supra*); these are the only books containing a report of that case; and see further to this "Repertorium Juridicum" (London ed., 1742), and Tomlin's "Repertorium Juridicum," under the name of this case.

In conclusion, it seems to us that the decision in Callard *v.* Callard, taken most strongly, went no further than to hold that the transaction in that case did not constitute an agreement to stand seised: that it was a transaction which amounted to nothing whatever, taking place on the land, and the grantor not passing the immediate possession, but reserving a present life estate, etc.; that it does not appear that the Exchequer Chamber found as they did, upon the general ground that a parol agreement to raise a use by standing seised upon good consideration would fail; that it has never been decided, in any case or class of cases, that under the Statute of Uses and the law of uses every agreement to stand seised must of necessity be by deed, — that is, that no agreement to stand seised is good without deed; that judicial legislation, which any such doctrine (as that such an agreement must be by deed) would be, is not to be inferred without clear adjudication; that the reports of Callard *v.* Callard, in the Exchequer Chamber, are on this point so diverse as to leave us without authentic evidence of the exact reasons; that the arguments of Gawdy, J., and Popham, C. J., are unanswerable, and have not been met; that the *dicta* in the books based upon these reports of Callard *v.* Callard do not show us what Callard *v.* Callard decided in this particular, and are no stronger than the reports of Callard *v.* Callard themselves.

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